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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

ERIE RAILROAD COMPANY AND THE PORT OF NEW YORK AUTHORITY, *Appellants*,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*.
No. 465

THE NEW YORK CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL., *Appellees*.
No. 466

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

ANSWER OF THE BALTIMORE AND OHIO RAILROAD COMPANY, WESTERN MARYLAND RAILWAY COMPANY AND CANTON RAILROAD COMPANY, APPELLEES, TO APPELLANTS' MOTION TO RECALL AND CLARIFY THE JUDGMENT.

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May 21, 1958.

The Daily Record Co., Baltimore 3, Md.

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Come now, The Baltimore and Ohio Railroad Company, Western Maryland Railway Company and Canton Railroad Company, appellees, in answer to appellants' Motion and Brief to Recall and Clarify the Judgment of this Court issued to the United States District Court for the District of Maryland on January 9, 1958.

STATEMENT

These appellees' contend that the question which appellants seek to bring before this Court is not the proper subject for a motion to recall and clarify judgment; that this question could only have been properly raised by a timely appeal from the decree and order of the District Court entered March 18, 1958; and that the time in which such appeal could have been properly taken has expired. In support of this position, these appellees adopt the brief of the Maryland Port Authority, et al., appellees, in opposition to appellants' motion.

Moreover, aside from the point of procedural defect, appellants' motion states no grounds warranting any action by this Court to recall and clarify its judgment.

The Interstate Commerce Commission by its order dated October 1, 1956 found, *inter alia*, that rates on import iron ore from New York made the same as the rates applicable from Baltimore were justified. The appellees here, among other parties, attacked the Commission's order by complaint filed in the District Court for the District of Maryland. That Court, upon a finding that irreparable damage to appellees would result if the equalizing rates from New York were made effective, immediately issued a temporary restraining order staying the Commission's order approving the New York rates and enjoining the appellant railroads from making them effective pending review and decision by the Court. After review the District Court vacated the Commission's order with respect to the New York rates and entered a permanent injunction against making them effective.

The New York railroads, appellants here, thereupon appealed the cause to this Court. In its judgment dated December 9, 1957 this Court did not criticize or reverse the

District Court's determination that the aforementioned order of the Commission lacked substantial basis and thus should be vacated. This Court merely found that the District Court, instead of permanently enjoining the New York rates, should have remanded the issue to the Commission to enable that body to consider port and port rate interrelationships among Baltimore, Philadelphia and New York, and for further order. Pursuant to this mandate the District Court by its decree dated March 18, 1957 remanded the issue of the New York rates to the Commission and enjoined appellant railroads from making such rates effective pending reconsideration and final decision of the Commission pursuant to the remand.

Under these circumstances contrary to appellants' contentions, as appellees will develop fully in their argument, the District Court has the power to enjoin the New York rates pending reconsideration and final order of the Commission, and its action in so doing is:

1. Entirely consistent with the order and judgment of this Court; and
2. Not precluded "by necessary implication" of this Court's order and judgment.

In the same order referred to above the Commission also approved rates on import iron ore from Philadelphia made the same as applicable from Baltimore. This issue likewise was before the District Court on the complaint of these appellees among other parties. The District Court found the order approving the Philadelphia rates not justified by adequate findings and ordered that issue remanded to the Commission for further consideration and order. On appeal this Court upheld the order of the District Court.

The Philadelphia rates have been in effect since February 19, 1954 and a very substantial volume of iron ore has

moved under them through a costly unloading facility constructed at Philadelphia previous to approval of the Philadelphia rates by the Commission. Under these circumstances the District Court permitted the Philadelphia rates to remain in effect "upon the assumption that steps be taken to secure a prompt determination" of the issue by the Commission. There is a material difference between the situation as it pertains to the New York rates and that pertaining to the Philadelphia rates. The New York rates have never been effective and should not now be permitted to become effective, thus encouraging the construction of a costly high-capacity unloading facility at New York, until they are found lawful. To do otherwise would only compound the injury now being inflicted upon appellees by the Philadelphia rates — an injury clearly recognized by the District Court in its admonition for prompt action by the Commission pursuant to remand. The decree of the District Court, far from dealing more harshly with the New York rates than with the Philadelphia rates merely preserves the *status quo* and seeks to prevent a greater degree of injury to appellees than has already occurred. Such action is clearly within the power of the District Court.

ARGUMENT

Reply to Point One

Contrary To Movants' Argument, The Issuance Of An Interlocutory Injunction By The District Court Is Consistent With The Order And Judgment Of This Court.

The argument made by the movants is that when this Court, by its opinion and order of December 9, 1957, 355 U.S. 175, "vacated" "so much of the decree of the District Court as did not affirm the order of the Commission" it necessarily condemned any injunction against the New York rates, and the District Court thereupon became powerless to issue another injunction "pending reconsideration

and final decision by the Commission pursuant to the remand * * *."

The argument is specious. It is grounded upon a misconception of the action taken by this Court in its opinion and order of December 9, 1957.

When the appeals in these cases were presented to this Court last year, the District Court's order included a remand of the Philadelphia rates to the Interstate Commerce Commission and a "permanent" injunction against the New York rates. As a result of the appeals, the *only* change made by this Court was to direct the District Court to convert the "permanent" injunction against the New York rates into a remand to the Commission (along with the Philadelphia rates). The Court said it made this change because:

> "* * * we deem it appropriate that, in reconsidering the relationship between the Philadelphia and Baltimore schedules pursuant to the remand of the District Court, *the Commission should be free to reconsider* and take action upon the New York schedules. In carrying out the District Court's direction regarding the Philadelphia rates, the *Commission should be permitted* to take into account the effect of New York rates on the tariff relationship between Philadelphia and Baltimore and the effect of that relationship on New York and to enter such orders with respect to all three ports as the Commission may find to be required by their interrelationship." (355 U.S. at 178) (Italics supplied.)

It was in the light of this conclusion that the Court ordered to be "vacated" "so much of the decree of the District Court as did not affirm the order of the Commission," and gave the direction that—

> "the cause is remanded for appropriate disposition not inconsistent with this opinion."

Following this mandate, the District Court did in terms "vacate" its order requiring a "permanent" injunction against the New York rates and substituted an order (the one which is the subject of the present motion) which remanded these rates to the Commission and further provided:

> "5. That pending reconsideration and final decision by the Commission pursuant to the remand, the tariff schedules on iron ore from New York filed to become effective February 9, 1953 shall not be made effective or permitted to become effective."

Thus did the District Court change the "permanent" injunction into an interlocutory injunction[1] "pending reconsideration and final decision by the Commission pursuant to the remand." Not only was this action consistent with the opinion of this Court, but any other action would have been inconsistent. The clear purpose of the opinion of this Court was—

> "that, in reconsidering the relationship between the Philadelphia and Baltimore schedules pursuant to the remand of the District Court, the Commission should be *free to reconsider and take action* upon the New York schedules." (Italics supplied.)

This purpose is expressly and clearly served by the District Court's order. The Commission is indisputably "free to reconsider and take action upon the New York schedules" along with the remanded Philadelphia rates. This Court said that the objective of the remand was to find a proper and lawful "interrelationship" with respect "to all three ports". Under the terms of the District Court's order of remand, nothing stands in the way of the accomplishment of this objective.

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[1] See *United States v. U. S. Smelting Co.*, 339 U.S. 186 (1950), at 199.

Reply to Point Two

Contrary To Movants' Argument, This Court Did Not By "Necessary Implication" Preclude The District Court From Enjoining The New York Rates Pending Remand.

Here the argument seems to be that, while the District Court had power originally to enjoin the New York rates "as ancillary relief", it lost that power when:

> "The order of this Court terminated this litigation and withdrew the Commission order, which was the basis for the District Court's jurisdiction, from the further consideration of that Court."

And, say the movants, since:

> "there is no longer any 'order' before the District Court to which an injunction of the involved rates can be ancillary. * * * It is evident * * * that such an injunction was an assumption by the District Court of the bare power to suspend rates while they are before the Commission for its administrative determination of their reasonableness."

Again the argument is specious. It completely ignores the general equity power of the District Court to maintain the status quo pending further litigation.

The precise nature of the rates the movants are so anxious to make effective should be understood at the outset. They are *unlawful* rates — *unlawful* in the sense that the movants have not met their statutory burden of proving them lawful. Not only is this the unqualified finding of the District Court, but it is a finding which the Supreme Court, although asked to do so, did not change. On the contrary, the District Court was upheld on the merits, the only change being that the Supreme Court would give the movants another chance to prove their case before the Commission in the present proceeding.

Moreover, the movants have insisted since the start of this litigation that at New York there are no adequate facilities to transfer iron ore from ship to rail, and consequently, until they were built, Baltimore could not be hurt. From the unreported decision of the District Court granting a temporary restraining order pending hearing before the three-judge Court, the "flat statement by counsel for the New York Central and Erie" was "that these facilities were so inadequate that they would not result in the diversion of any iron ore from Baltimore."[2] The movants regard the building of "the necessary unloading facility * * * at New York" as having the same importance as "equalized rates" in attracting iron ore away from other ports such as Baltimore.[3]

Why, then, are the movants so anxious to dissolve the injunction and "share", as they insist in their present motion, "in the tremendous volume of import iron ore which their Philadelphia and Baltimore competitors have been monopolizing for the past 4 years?"[4]

The clear answer is indicated in the same unreported decision referred to above wherein, to avoid irreparable injury to Baltimore, the District Court granted a temporary restraining order pending consideration by the three-judge court.[5] The Court said:

> "The Court is impressed by the fact that, despite the claim that no diversion from Baltimore to New York could presently take place, the New York Central and Erie Railroads appear to be insistent upon making, or

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[2] *The Baltimore and Ohio Railroad Company, et al. v. United States of America, et al.*, Civil Action No. 9237, filed October 29, 1956, U.S.D.C. for Md.

[3] Brief in opposition to Motion to Affirm as filed in these cases by Erie Railroad, et al., at p. 12.

[4] At p. 4.

[5] See footnote 2, at pp. 7-8.

endeavoring to make, the new rates immediately effective and have declined voluntarily to withhold the institution of such new rates pending the decision herein by the three-judge court, although they have been advised that such court could convene in the very near future, and probably by the early part of December.

"During the course of the hearing it was developed that the Port of Philadelphia, prior to its new installation of ore-unloading facilities, had had no adequate facilities for the unloading of iron ore from ships, but that with the differential between Philadelphia and Baltimore in effect, $10,000,000 had been expended for modern iron ore unloading facilities, after which application had been made to the Interstate Commerce Commission for the elimination of the differential. According to the statements made during the hearings and uncontradicted, one of the arguments advanced before the Commission for the elimination of the differential was that if this were not done, these new facilities would be completely non-income producing. While there is no indication that any immediate modernization of ore unloading facilities will be made in New York, the Court cannot ignore the possibility that a rapid start might be made and a similar argument then made in support of the Commission's decision and order."

* * * * * *

"* * * the Court has no difficulty in finding that the risk of harm to the Baltimore interests from a failure to suspend the effectiveness of the Commission's order (such harm being both financial, i.e., inability to use unloading and loading facilities and interchange equipment in place and available, and from a precedent standpoint) is materially greater if the effectiveness of the Commission's order is not stayed than would be the harm to New York interests if it were stayed, pending determination on the merits by the statutory three-judge court."

Exactly the same considerations require injunctive relief "pending reconsideration and final decision by the Commission pursuant to the remand".

The power of the District Court to provide such relief is not open to question. It "is a power inherent in the Court, as a court of equity, and has been exercised from time immemorial." *Inland Steel Co. v. United States, et al.*, 306 U.S. 153 (1939) at p. 156.

In *Cantlay & Tanzola v. United States*, 115 F. Supp. 72 (1953), there was presented "the question * * * whether injunctive relief is required to preserve the status quo pending further proceedings before the Commission", and the argument was that to grant such relief would represent the suspension of carrier-made rates, a power "intrusted to the Commission only", citing *Board of Railroad Commissioners v. Great Northern Ry.*, 281 U.S. 412 (1930) at p. 429. In its decision the District Court, while recognizing "The Congressional intent * * * that the Courts not interfere to suspend carrier-made rates 'prior to an appropriate finding by the Interstate Commerce Commission", went on to point out (115 F. Supp. at 83):

> "Nowhere does there appear any manifestation of Congressional intent to deprive the district courts of their inherent equity jurisdiction to employ the writ of injunction in maintaining the *status quo* pending hearing and determination of an action, see United States v. United Mine Workers, supra, 330 U.S. at pages 290-295, 67 S. Ct. 677, 91 L. Ed. 884, or 'in affording relief which it was the purpose of Congress to ensure', whenever such a course is necessary to the effectiveness of the court's decree. The Chicago Junction Case, supra, 264 U.S. at page 270, 44 S. Ct. at page 321, 68 L. Ed. 667."

In the cited case an injunction was not found necessary to preserve the status quo since the Court had previously ordered the restoration of the former rates and found that (115 F. Supp. at p. 84):

> "* * * it will not be possible in our opinion for the rail carriers again to lower the rates, without first filing schedules * * *. The Commission may thereupon proceed with a new investigation and suspension proceeding. * * * Finally, any order which might hereafter be made by the Commission, in either a new proceeding or the proceeding hereunder review, would be 'subject to challenge if not adequately supported * * *' and would moreover be subject to stay pending suit in the district court."

In the present case the equalized rates are already on file with the Commission and in the absence of an injunction pending the Commission's reconsideration, they would automatically go into effect — despite the fact that they are *illegal* rates, illegal in the sense that the Commission's order which sanctioned them has been upset in court. In these circumstances, injunctive relief pending remand is required to give Baltimore the same character of protection from irreparable injury as assured the protesting parties in *Cantlay & Tanzola v. United States, supra.*

In granting the present injunction pending remand the District Court acted within its statutory authority.[6] But

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[6] 28 U.S.C. sec. 2324 provides as follows: The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

5 U.S.C. sec. 1009(d) provides as follows: Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent

even if this statutory power is not expressly spelled out (to cover specifically an injunction pending remand) the District Court, acting as a court of equity, had an unquestioned right to forestall during remand the irreparable injury which otherwise would be inflicted upon Baltimore. In so acting the District Court is not circumscribed by the absence of statutory authority. *Virginian Ry. v. United States*, 272 U.S. 658 (1926) at p. 671.

The finding of irreparable injury has *already* been made in this case. See unreported decision cited in footnote 2. The present injunction of the District Court is necessary to guard against the same irreparable injury "pending reconsideration and final decision by the Commission pursuant to the remand". Such protection, so limited, is altogether consistent with the mandate of this Court.

CONCLUSION

In the absence of an injunction pending remand, the movants would be able to make effective rates on import iron ore which they have not justified and which have been found to be unlawful. Under the mandate of the Supreme Court, the movants will have another chance to prove their case, but until and unless they do so, Baltimore is clearly entitled to be protected from irreparable injury.

The threatened publication of these rates was found to inflict irreparable injury before the District Court had had an opportunity to pass on their merits. Now that their unlawful character has been judicially determined, the irre-

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irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

parable nature of the threatened injury is increased. Certainly the District Court, acting as a court of equity, is empowered to issue injunctive relief — limited, as required under the Supreme Court's mandate, to the period "pending reconsideration and final decision by the Commission pursuant to the remand".

Respectfully submitted,

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